What section 84 says is:—

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

In other words, there must be a certain state of mind — incapacity of knowing the nature of the act or incapacity of knowing it is wrong — but in every case that must exist by reason of unsoundness of the mind. Now, this is nothing but a translation into simple language of a statement of the law given by the Judges in England commonly known as the M'Naghten rules and generally speaking we are of the opinion that to read it to a jury is an adequate direction, subject to this that where there is a considerable body of conflicting evidence it may be necessary to indicate its application to particular parts of the evidence. Here, however, the evidence was short and straightforward. The medical evidence called by the defence did not support insanity in any way. There was nothing in the conduct of the appellant after his arrest as it transpired from the evidence that suggested any unsoundness of mind. And as regards the story of the snake the jury had seen the appellant in the witness-box, they had heard his story and they were in a position themselves to say whether they thought it made out unsoundness of the mind. In the circumstances we think the Judge's direction on the point was adequate.

The other point on which the Judge's direction as to insanity was attacked was that he misdirected the jury as to the weight of burden of proof. On that point we can only say that we adhere to what we said in the case of *Azro* v. *Public Prosecutor* [2] where we accepted as binding on us what was said by Sir Percy McElwaine as long ago as 1938 in the Straits Settlements case of *Chia Chan Bah* v. *The King*.[3]:—

"In a trial for murder it is incumbent on the Crown to prove beyond reasonable doubt that the accused killed the deceased by an act which constitutes murder within the meaning of section 300 of the Penal Code. Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106* of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he tip the scale of probability in his favour — if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane. As it is put in *Rex* v. *Sodeman* [4] the onus on an accused in setting up such an exception as insanity is no higher than the onus on an accused in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a Civil Suit."

* S. 105 of the F.M. Evidence Ordinance (No. 11 of 1950).

The direction as to the burden of proof in this case is substantially the same as that and we do not think it is open to us after 25 years to say that that is wrong.

The appeal is dismissed.

Appeal dismissed.

Solicitors:—*Rajendra & Teik Ee.*

AU-YONG v. DICUM & ANOR.

[C.A. (Thomson C.J., Barakbah J.A. and Neal J.) September 11, 1963]

[K.L. — F.M. Civil Appeal No. 28 of 1963]

Bankruptcy—Bankruptcy notice—Substituted service —Copies of notice unsealed and unsigned—Whether valid —Whether mere irregularity or nullity—Bankruptcy Rules, 1921, rr. 95 & 107.

Practice and Procedure—Counterclaim not set up in the action—Whether it can be set up at hearing of petition.

After three unsuccessful attempts by a process server of the court to serve on the debtor a bankruptcy petition by the petitioning creditor, the latter obtained an order for substituted service which read, "the bankruptcy notice on the debtor be served by posting copies of the notice, together with copies of the order for substituted service on the notice boards of the Supreme Court and the Magistrate's Court and on the front door of No. 9A Keng Hooi Road, Kuala Lumpur, being the last known place of residence." Service in this form was duly effected.

The debtor opposed the bankruptcy petition on the grounds that (a) he had a counterclaim against the petitioning creditor in the sum of $27,000 being fees for professional services and (b) the bankruptcy notice was not duly served on him because it did not bear the seal of the Court and the signature of the Registrar under whose hand it was issued contrary to Rules 95 and 107 of the Bankruptcy Rules, 1921.

In the Court below (*ante* p.246), the learned judge made a receiving and adjudicating order against the debtor. On appeal:

Held: (1) the debtor not having raised his counterclaim in the original proceedings against him as he could have done, he could not now raise it in order to set aside the bankruptcy notice;

(2) (by Thomson C.J. and Barakbah J.A.) even if service of an unsealed and unsigned copy of the bankruptcy notice was contrary to the Bankruptcy Rules, it was a mere irregularity which had occasioned no injustice to the debtor;

(3) (by Neal J.) no breach of a mandatory rule is an irregularity but in the circumstances of the case no court could direct these proceedings be rendered void.

Cases referred to:—

(1) *Ex parte Chatteris* L.R. 10 Ch. 227.

(2) *Muthiah Chettiar ex parte Ramanathan Chettiar* [1938] M.L.J. 233.

(3) *In Re G.E.B., A Debtor* [1903] 2 K.B. 340, 349.

(4) *Watt* v. *Barnett* (1878) 3 Q.B.D. 363, 366.

(5) *Pontin* v. *Wood* [1962] 1 Q.B. 594.

(6) *In re Prichard* [1963] 2 W.L.R. 685.

(7) *Fry* v. *Moore* (1889) 23 Q.B.D. 395, 398.

(8) *MacFoy* v. *United Africa Co. Ltd.* [1962] A.C. 152, 160.

(9) *Craig* v. *Kansson* [1943] K.B. 256.

(10) *In re A Debtor* [1908] 2 K.B. 684, 690.

(11) *In re A Debtor, No. 21 of 1950* [1951] 1 Ch. 313.

COURT OF APPEAL.

K. L. Devaser for the appellant.

S. D. K. Peddie for the first respondent.

Cur. Adv. Vult.

Thomson C.J.: Receiving and adjudication orders in bankruptcy were made against this appellant on 3rd June, 1963, and against these orders he has now appealed.

Judgment against the appellant was entered on 3rd July, 1962, at the suit of a Doctor Dicum for $25,000 and interest and costs for money lent. The writ was issued on 17th May, 1962.

On 5th February, 1963, when no part of the judgment had been satisfied and the total amount due was $26,674, a bankruptcy notice was issued. The notice was in proper form and as regards its form no complaint has been made. Personal service of the notice proved impossible and on 18th March, 1963, an order was made for substituted service. This order, the validity of which has never been questioned, though it could have been (see *Ex parte Chatteris,*[1]), provided that the notice be served by posting copies on the notice boards of the Supreme Court and Magistrate's Court, Kuala Lumpur and on the front door of No. 9A, Kong Hooi Road, Kuala Lumpur, the last known place of residence of the debtor.

This was done and somehow or other the notice came to the knowledge of the appellant for on 8th April, 1963, he filed an affidavit which referred to the bankruptcy notice. It stated that he had a set-off against the creditor's claim for $27,000 for fees for professional services rendered by him to the creditor over "a period of many many years", that the creditor was accordingly indebted to him in the sum of $27,000 and that in those circumstances he prayed that the bankruptcy notice be set aside. There was attached what purported to be a signed bill of costs covering the period 5th January, 1951 to 30th December, 1961, for a lump sum of $27,000 in respect of professional services rendered during this period, being advice "regarding your bigamous marriage with your Chinese wife". It is unnecessary to quote the description of these alleged services at length, but it is to be observed that in the bill the words "bigamous" and "bigamy" occur at least four times.

Four days later, on 12th April, the creditor filed a bankruptcy petition against the appellant, the act of bankruptcy alleged being non-compliance with the bankruptcy notice.

No steps were taken by the appellant to prosecute his application to set aside the bankruptcy notice but on 4th May he gave notice of intention to oppose the bankruptcy petition and in his supporting affidavit he again alleged that the creditor owed him $27,000 and was withholding payment of that sum with the intention to hold it as security against the judgment debt.

Up to this stage nothing had been said regarding the validity of the bankruptcy notice, but at some time it either came to the appellant's knowledge that the copies of the bankruptcy notice which had been posted on the notice boards of the Supreme Court and the Magistrate's Court at Kuala Lumpur had not been sealed and signed or he discovered the case of *Muthiah Chettiar ex parte Ramanathan Chettiar,*[2] to which I shall refer later, and on 8th May he filed a further affidavit to the effect:

> "that the Notice of Bankruptcy served on me is a copy and not a sealed copy as required by the Law of Bankruptcy."

The following day a further affidavit was filed amplifying this statement and he amended his notice of intention to oppose the petition by adding the ground that he had not committed an act of bankruptcy as alleged because the bankruptcy notice was not signed and sealed and was therefore not duly served on him.

On 13th May, 1963, the petition came on for hearing before Gill J. and he made a receiving order and adjudicated the appellant a bankrupt.

Against that decision the appellant has now appealed.

His grounds of appeal are those on which he opposed the petition, that is to say that he has a counterclaim for more than the amount of the judgment debt and that the bankruptcy notice was not duly served because at any rate two of the copies that were posted in pursuance of the Order for substituted service were not sealed with the seal of the Court and signed.

With regard to the first of these grounds of appeal, Gill J. considered the complaint was without merit. The appellant had not raised his claim, as he could have done, as a counterclaim in the original proceedings aganst him nor had he taken any subsequent steps to pursue it. On the other point Gill J. took the view that under

the Bankruptcy Rules signing and sealing of copies of the notice was not necessary where substituted service had been ordered.

For myself I agree that the point regarding the available counterclaim is without merit and would content myself with quoting the following words of Vaughan Williams L.J. in the case of *In re G.E.B., A Debtor.*[3]

"it is possible that there might be a defendant who through carelessness, or for some other reason personal to himself, did not care to set up the set-off. Now, we will take that case, and we will suppose the debtor had a set-off and could, if he had chosen, have relied upon it as a defence to the action. Judgment is obtained against him without reference to that set-off. A bankruptcy notice is issued. Could he have that bankruptcy notice set aside? Clearly not, if one has regard to the words 'and which he could not set up in the action in which the judgment was obtained'. The Act of Parliament expressly prevents his relying upon a set-off as a ground for setting aside the bankruptcy notice in a case in which he could have set it up but did not."

The reference in this passage to "the Act of Parliament" is to section 4(1)(g) of the Bankruptcy Act, 1883, the words quoted from it apply to a counterclaim as well as to a set-off and the same wording is to be found in section 3(1)(i) of the Bankruptcy Ordinance, 1959.

With regard to the second ground of appeal, there is no doubt that two sealed copies of the bankruptcy notice were issued to the creditor's solicitors but it is true that the two pieces of paper which were posted on the Courts' notice boards were copies of these (the accuracy of which is not questioned) which were made by the petitioner's solicitors and were not signed or sealed with the seal of the Court

Now, there is no doubt that the Bankruptcy Rules require that a bankruptcy notice must be sealed (rule 9) and that all office copies must be sealed (rule 11). Again a bankruptcy notice must be personally served except where an order is made for substituted service. By rule 95 a bankruptcy notice must be served in the same way as the Rules require service of a creditor's petition and by rule 107 "a creditor's petition shall be personally served by delivering to the debtor a sealed copy of the filed petition" but by rule 108 an order for substituted service may be made.

It may be, as was thought by the trial Judge, with whom I hasten to say I do not disagree, that the requirement that the copy to be served shall be sealed does not apply where substituted service is ordered and where, as here, the order for substituted service does not specify posting of a sealed copy.

I think, however, the matter merits a little further consideration by reason of the case of *Muthiah Chettiar ex parte Ramanathan Chettiar, supra.* In that case a bankruptcy notice was served by exhibiting to the debtor a sealed copy and handing him a copy which was unsealed. Sir Percy McElwaine took the view that this service was not in accordance with the rules then in force in the Straits Settlements (which do not materially differ from those in force here to-day), that the sealing was not a mere formality and that without the seal on the copy delivered the bankruptcy notice was bad. Consequently the alleged act of bankruptcy, which was non-compliance with the notice, was not an act of bankruptcy and the petition with which he was concerned must be dismissed.

With great respect I am unable to agree that that case should be followed.

In my view, consideration of the question must commence from section 131 of the Bankruptcy Ordinance which reads as follows:—

"No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

That section is the same as section 147 of the English Act of 1914 and it is also the same as section 128 of the Straits Settlements Ordinance (Cap. 45) which was in force in Malacca when *Muthiah Chettiar's* case was decided and which apparently was not referred to or considered in that case.

In relation to the application of section 131 of the Bankruptcy Ordinance there are two questions to be considered.

The first is whether what is complained of is an irregularity. If any non-compliance with the requirements of the law goes beyond being a mere irregularity and amounts to something that renders the proceedings a nullity that is, of course, the end of the matter and the section has no application. If there is only an irregularity the second question is whether the Court is of opinion that in consequence "substantial injustice has been caused".

But before proceeding to these questions let us be clear as to just what the appellant is complaining of. His complaint as formulated in his amended notice of intention to oppose the petition dated 9th May, 1963, was that he had not committed:

"the alleged act of bankruptcy on which the creditor's petition is based, as the said Bankruptcy Notice was not duly served on me, because it did not bear the seal of the Supreme Court of the Federation of Malaya and the signature of the Senior Assistant Registrar, Supreme Court, Kuala Lumpur."

However much counsel may try to exegesise that statement it is a complaint of defective service and it is to be observed that there lurks in it a fallacy. This was a case of substituted service and what was served on the appellant was not the pieces of paper that were stuck on the various notice boards and on his door but the bankruptcy notice itself and both it and the office copies which were handed to and were in the possession of the petitioner's solicitors were properly signed and sealed. Where there is an order for substituted service then so long as it remains undischarged compliance with it is "equivalent for all purposes to actual service" (*per* Jessel M.R.; *Watt* v. *Barnett* [4]).

In any event, however, it is my view that even at the very worst there was nothing more than an irregularity. I will not go through all the cases on the much argued question of irregularity and nullity. They have been recently discussed by the English Court of Appeal in the cases of *Pontin* v. *Wood* [5] and *In re Prichard* [6] and to go through them again here would merely be to repeat what was said there. Of all these cases the one that is most in point here and which, it is to be observed, was not cited to McElwaine C.J. is *Fry* v. *Moore.*[7]

That was a case where a Writ had been issued without leave against a person who at the date of the Writ was out of the jurisdiction and the plaintiff obtained an order for substituted service within the jurisdiction. Lindley L.J. pointed out that the order for substituted service was in the circumstances a "bad order". He went on:—

> "But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived."

He then held that the irregularity had been waived, as was the case of the plaintiff, but that only arose when it was established that what was involved was an irregularity and not a nullity. Lopes L.J. took the same view. He said (at p. 399):—

> "It is said that the proceeding was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity. The proceeding — the issue of the writ — was a proper one; the irregularity was only in the mode in which it was attempted to carry it out by service."

This view finds an echo eighty years later in the case of *MacFoy* v. *United Africa Co. Ltd.*[8] where in relation to the distinction between a nullity and an irregularity Lord Denning said:—

> "No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?"

The only other case to which I would refer is *Craig* v. *Kanssen.*[9] That was a case where there had been no service at all and Lord Greene M.R. after referring to *Fry* v. *Moore, supra,* said that the proceedings were a nullity on the ground (p. 262) that:—

> "failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation".

In the present case there was no "failure of process". What there was (if indeed it was that) was a failure to effect service in the way required by the Bankruptcy Rules and, basing myself on the case of *Fry* v. *Moore, supra,* I take the view that that was an irregularity and nothing more.

That leads to the question whether there has been any substantial injustice and of course in a case of bankruptcy that must be examined with the most scrupulous anxiety for as was said by Bigham J. in the case of *In re Threadkell* quoted by Farwell L.J. in *In re A Debtor* [10] bankruptcy proceedings "have the most grievous consequences not only for the debtor but other people".

Here the appellant has not even alleged that there has been any injustice, far less any "substantial injustice". He has not said that the notice did not come to his knowledge or that it came to his knowledge when it was too late to do anything about it, and indeed he could not say so because the fact that he was able to take very vigorous steps, and take them in proper time, to deal with it shows that he did have timeous knowledge. Nor has he said that there was anything in the paper he saw that could have misled him in any way (as in *In re A Debtor, No. 21 of 1950* [11]), and indeed he could not say that for the paper that was posted was a true copy of the original notice. He could not even say that he did not know how to test the accuracy of the copy, for as a solicitor he knew very well just how and where to verify it.

All he has said is that there has been non-compliance with the rules. If there has been non-compliance it may be that he as a conscientious servant of the law has suffered the same sort of emotional trauma as is suffered by a musician when he hears a false note in a rendering of a Beethoven sonata. But lawyers

should be made of sterner stuff and anyhow aesthetic anguish on the part of a hyper sensitive soul is one thing and injustice, particularly in bankruptcy, is another thing. And the two things are different.

For these reasons I would dismiss the appeal with costs.

Barakbah J.A.: This is an appeal against the decision of Gill J. in making receiving and adjudication orders in bankruptcy against the appellant on 3rd June 1963.

There were two main grounds of appeal. Firstly, the appellant had a counterclaim for a debt due to the respondent on a bill of costs amounting to $27,000 and secondly, copies of the bankruptcy notice posted in accordance with the order for substituted service were neither sealed nor signed.

I have had the advantage of reading the judgments of the learned Chief Justice and Neal J. I am in agreement with their views with regard to the first ground of appeal and have nothing to add.

Regarding the second ground, the question to decide is whether non-compliance with the Bankruptcy Rules in the present case amounts to a nullity or an irregularity.

The learned trial Judge had made an order of substituted service "by posting copies thereof together with copies of the order made herein on the Notice Boards of the Supreme Court and Magistrates' Court Kuala Lumpur and also on the front door of No. 9A Keng Hooi Road, Kuala Lumpur, being the last known place of residence of the debtor herein."

The order was carried out but the appellant complained that the bankruptcy notice was not duly served on him because it did not bear the seal of the Supreme Court and the signature of the Senior Assistant Registrar, Supreme Court.

Rule 9 of the Bankruptcy Rules states that all summonses petitions notices orders warrants and other process issued by the Court shall be sealed.

According to Rule 95:

> "A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition."

and rule 107 provides:

> "A creditor's petition shall be personally served by delivering to the debtor a sealed copy of the filed petition."

Rule 108 states:

> "A petition shall be served upon the debtor by an officer or bailiff of the Court or by the creditor or his solicitor or bailiff of the Court or by the creditor or his solicitor or by some person in their employ; provided that if personal service cannot be effected the Court may extend the time for hearing the petition or if the Court is satisfied by affidavit or other evidence on oath that the debtor is keeping out of the way to avoid such service or service of any other legal process or that for any other cause prompt personal service cannot be effected it may order substituted service to be made by delivery of the petition to some adult immate at his usual or last known residence or place of business or by registered letter or *in such other manner as the Court may direct* and that such petition shall then be deemed to have been duly served on the debtor."

It was conceded by counsel for the respondents that the copies posted in accordance with the said order of Court were neither sealed nor signed. The order mentioned "by posting copies thereof". It did not say "sealed copies" and, in my opinion, the Court did comply with the provision of rule 108 which states *inter alia* "in such other manner as the Court may direct." Therefore to my mind there was good and sufficient service of the notice on the debtor. But assuming that rule 107, which requires a sealed copy, had not been complied with, in my view, it was an irregularity — not a nullity, which could be cured by section 131 of the Bankruptcy Ordinance. The section reads:

> "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

I say it is an irregularity because it affected only the mode of service. Although the copies which were posted on the board were not sealed, the creditor's solicitors were issued with two sealed copies by the Court. Furthermore, there was in the first instance a waiver of the irregularity by the appellant — *Fry* v. *Moore* [7] — and having regard to all the circumstances of the case, I consider that no substantial injustice had been caused by this irregularity to the appellant. Therefore, with respect, I agree with the opinions expressed by the learned Chief Justice and Neal J. that the appeal should be dismissed with costs.

Neal J.: The appellant appeals to the Court of Appeal against receiving and adjudication orders made by Gill J. on the 3rd June 1963. The appellant had opposed the making of such orders before Gill J. and had asserted that the bankruptcy notice had not been properly served or rather that there had been no service of the bankruptcy notice. There appears to be some dispute or doubt as to whether he maintained throughout those proceedings his claim to have a set-off or whether he dropped that line of defence. Before us both were put forward as

grounds of appeal. I find no merit in the claim for a set-off as required in law. It is obvious on the document referred to as a bill of costs that a large proportion of the bill is statute barred and as the bill purports to be for approximately the same sum as the judgment debt it is clear that even if it is a proper bill and not what looks suspiciously like an attempt at blackmail the amount recoverable having regard to statutory limitations will not be equivalent to the judgment debt and there will still be some part of the judgment debt owing. I see then no merit in that ground of appeal.

The second ground of appeal was based upon the assertion that the copies of the bankruptcy notice posted in accordance with the order for substituted service were neither sealed nor signed. This was conceded by counsel for the respondents. The actual order for substituted service made by the same judge on the 18th March 1963 read, *inter alia,*

"It is ordered that the bankruptcy notice issued herein on the 5th day of February 1963 be served on P. W. Au-Yong of No. 9A, Keng Hooi Road, Kuala Lumpur, the debtor herein, by posting copies thereof together with copies of the Order made herein on the Notice Boards of the Supreme Court and Magistrate's Court, Kuala Lumpur, and also on the front door of No. 9A, Keng Hooi Road, Kuala Lumpur, being the last known place of residence of the debtor herein and that such postings shall be deemed good and sufficient service on the said debtor seven (7) days after the date of last of such posting and that the time for service of the said bankruptcy notice be and is hereby extended for four (4) months from the date of issue of same."

It was argued before us that the words, "copies in relation to the bankruptcy notice," must mean sealed copies and since no sealed copies were posted there was no service. The appellant was overruled when he took this point in the court below by the judge who had himself made the order for substituted service and who would under any normal circumstances have been the person best qualified to say what he meant. In my opinion, however, once the order was made that copies of the bankruptcy notice be posted it was not open to the judge in the court below to assign to those words the meaning of unsealed copies or any other meaning than that given by the Enactment or Rules. I would concede that the words in the rule enabling an order for substituted service in the penultimate part is wide enough for an order to have been made that unsealed copies be posted but in my opinion once the word, "copies," alone was used I am bound to give to the word, "copies," the meaning provided by the rule. I add here that no suggestion was made on the part of the appellant that the order for substituted service as used was *ultra vires.* To understand the Bankruptcy Rules in connection with this particular matter, it is pertinent first of all to note in rule 91 that provision is made for the issue for service of two sealed copies. If one at this stage refers to the form of affidavit of service of the bankruptcy notice as contained in the forms attached to the Bankruptcy Rules, one notices that the second sealed copy is attached to the affidavit of service. Though nothing turns on it, it is to be noted that the affidavit of service did not return a sealed copy and no explanation has been given as to the whereabouts of these two sealed copies. Bankruptcy rule 9 provides in terms that all summonses, petitions, notices, orders, warrants or other process issued by the court shall be sealed. It is to be noted that this mandatory rule refers to all notices which on the applicatoin of the maxim *qui omni dicit nihil excludit* must include copies of notices. In my opinion that rule alone would have been sufficient authority. There is, however, additional provision in bankruptcy rule 11 where it provides in referring to office copies of petitions proceedings affidavits that they shall be sealed. For those reasons, in my opinon, it was not open to the judge in the court below to hold that the reference to the word, "copies," in the order for substituted service and which has been extracted meant unsealed copies. I have considered the question of whether this is an irregularity which can be cured under the provisions of the Bankruptcy Ordinance and I have reached the conclusion since I am of the opinion that no breach of a mandatory rule can be described as a formal defect or an irregularity that it is not an irregularity which can be cured. Again during the course of the hearing before the Court of Appeal it was agreed that there were outstanding two other petitions of appeal and the records of the court showed that one of those petitions was based upon an act of bankruptcy, namely, a *nulla bona* return to a warrant of execution, that return having been made months prior to the filing of the petition in bankruptcy with which we are concerned and it therefore could have been used by the respondent in his petition as an alternative and he could have amended his petition before Gill J. and asserted it as an alternative act of bankruptcy. I have considered whether under the circumstances the Court of Appeal has power to substitute this act of bankruptcy and maintain the receiving and adjudication orders already made. On a consideration of the authorities dealing with amendment or alteration to the act of bankruptcy it would appear that the powers granted to the court below and to the Court of Appeal would have been wide enough to have so acted were it not for the fact that all the decided authorities have held that such a power should not be exercised after the expiry of three months from the date of filing of the petition.

The next provision of the law which falls for consideration is bankruptcy rule 285 which provides:

"Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceedings void unless the Court shall so direct but such proceedngs may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit."

I am satisfied that on consideration of all the facts, and in particular that the appellant is a practising advocate and solicitor with not only easy access to the Registry but also with a knowledge of personnel, in particular of the names of those of the Registry, that no court could direct that these proceedings should be rendered void.

It is not clear to me whether this particular bankruptcy rule means that the court is bound to do one of the many things authorised as an alternative to directing the avoidance of the proceedings. But had I been sitting in first instance the order I would have made would have been that the receiving and adjudication orders be suspended for a period to enable payment of this particular debt.

The appellant has already by virtue of stay of proceedings pending this appeal obtained a similar advantage. However, if I were bound as a member of the appeal court to make some form of order to off-set the non-compliance with the rules, it would amount to no more than altering dates of the receiving and adjudication orders as at the date of this judgment.

Further, it seems to me that having admitted the correctness of the judgment and having regard to the nature of the alleged set-off and the remarks I have made, it was open to the appellant to provide a deposit in Court for the amount of the judgment which he admits or such part thereof as was not the subject of a legally maintainable set-off. Had he adopted this course, it would in my opinion, have merited him more sympathetic consideration in this case pursuant to the bankruptcy rule I have referred to. However, in view of the fact that this court is agreed upon the fact that the appeal must be dismissed, and is unable to agree upon the reasons, it is not in my opinion necessary for me to say any more than that I agree this appeal must be dismissed with costs to the respondent as taxed.

Appeal dismissed.

Solicitors:—*K. L. Devaser & Co.*; *Skrine & Co.*

THE GOVERNMENT OF THE STATE OF KELANTAN v. THE GOVERNMENT OF THE FEDERATION OF MALAYA AND TUNKU ABDUL RAHMAN PUTRA AL-HAJ

[O.C.J. (Thomson C.J.) September 14, 1963]

[K.L. — Civil Suit No. 657 of 1963]

Constitutional Law—Federation of Malaya Constitution, 1957—Amendments to —Power of Parliament—Power of Executive Government—Admission of new States—Whether individual States or Rulers to be consulted—Federation of Malaya Agreement, 1957—Malaysia Agreement, 1963—Malaysia Act, 1963.

Administrative Law—Injunction—Declaration—Suit against Government—Whether any interim remedy available—Test applicable—Probability of making out a case.

On July 9, 1963 the Governments of the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore signed the Malaysia Agreement whereby Singapore, Sarawak and North Borneo would federate with the existing States of the Federation of Malaya (including Kelantan) and whereafter the Federation would be called "Malaysia". The Federal Parliament then passed the Malaysia Act (the bill form of which had been annexed to the Malaysia Agreement) to amend the Federation of Malaya Constitution, 1957, Article 1(1) and (2) to provide, *inter alia*, for the admission of the three new States and for the alteration of the name of the Federation to that of "Malaysia". The Act received the Royal Assent on August, 26 and was to come into operation on September 16.

On September 10 the Government of the State of Kelantan commenced proceedings for declarations that the Malaysia Agreement and the Malaysia Act were null and void or alternatively were not binding on the State. It was argued for the State of Kelantan that the Malaysia Act would abolish the "Federation of Malaya" thereby violating the Federation of Malaya Agreement, 1957; that the proposed changes needed the consent of each of the constituent States, including Kelantan, and this had not been obtained; that the Ruler of Kelantan should have been a party to the Malaysia Agreement; that constitutional convention called for consultation with Rulers of individual States as to substantial changes to be made to the Constitution; and that the Federal Parliament had no power to legislate for Kelantan in respect of any matter regarding which that State had its own legislature.

On September 11, the plaintiff Government gave notice of motion that pending the ultimate disposal of their suit, the Court should by order restrain the defendants from carrying into effect any of the provisions of the Malaysia Act. The question then for decision was whether on the facts before the Court there was a probability that the plaintiff Government was entitled to the relief they sought.

Held: (1) Parliament in enacting the Malaysia Act so as to amend *inter alia* Article 1(1) and (2) acted within the powers granted to it by Article 159 of the Constitution. The Constitution which formed an integral part of the Federation of Malaya Agreement, 1957, (to which Kelantan was a party) did not require consultation with any State as a condition to be fulfilled;

(2) the Malaysia Agreement was signed for the "Federation of Malaya" by the Prime Minister, Deputy Prime Minister and four members of the Cabinet. This was in compliance with Articles 39 and 80(1) of the Constitution and there is nothing whatsoever in the